Nos. 06-5618 & 06-5754

IN THE

Supreme Court of the United States

MARIO CLAIBORNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

VICTOR A. RITA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Fourth and Eighth Circuits

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a district court's application of the Sentencing Guidelines produces a presumptively reasonable sentence.

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INTEREST OF *AMICUS CURIAE*[1]

Congress's driving motivation in the Sentencing Reform Act of 1984 was to reduce unwarranted disparity in federal sentencing, so that "defendants with similar records who have been found guilty of similar criminal conduct" are treated in like fashion, regardless of the judge who imposes the sentence. 28 U.S.C. § 991(b)(1)(B); *see* 18 U.S.C. § 3553(a)(6). To accomplish that purpose, Congress established the United States Sentencing Commission (the "USSC" or the "Commission") as an "independent commission in the judicial branch of the United States" charged with issuing and continually revising the United States Sentencing Guidelines (the "Guidelines"). 28 U.S.C. §§ 991(a)-(b), 994(b)(1). Accordingly, the Commission has a direct interest in the standards for appellate review of sentences issued in consideration of those Guidelines. The Commission previously submitted briefs in this Court as *amicus curiae* in *United States v. Booker*, 543 U.S. 220 (2005), and *Mistretta v. United States*, 488 U.S. 361 (1989).

STATEMENT

A. The Problem Of Disparity In Sentences Identified By Congress

In 1984, Congress enacted the Sentencing Reform Act (the "Act") in response to an emerging consensus that the federal sentencing system was seriously broken and in need of major repair. Before the Act, "each judge [was] left to apply his own notions of the purposes of sentencing. As a result, . . . Federal judges mete[d] out [a] . . . wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances." S. Rep. No. 98-225, at 38 (1983). Indeed,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

"[t]he absence of Congressional guidance to the judiciary . . . all but guaranteed that . . . similarly situated offenders . . . [would] receive different sentences." H.R. Rep. No. 98-1017, at 34 (1984). Numerous studies from the pre-Guidelines era confirmed that differences among judges in sentencing philosophies caused disparity.[2]

The principal purpose of the Act was to reduce these "glaring disparities," S. Rep. No. 97-307, at 956 (1981), between "defendants with similar records who have been found guilty of similar criminal conduct." 28 U.S.C. § 991(b)(1)(B). Congress acknowledged the necessity of "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." *Id.* But Congress principally intended the Act to effect a dramatic shift away from complete judicial discretion and toward more consistent, structured sentencing by establishing a "comprehensive and consistent statement of the Federal law of sentencing, setting forth the purposes to be served." S. Rep. No. 98-225, at 39.

To that end, Congress limited sentencing judges to considering seven factors in imposing a sentence: "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1); the four purposes of punishment, *id.* § 3553(a)(2); "the kinds of sentences available," *id.* § 3553(a)(3); the applica-

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[2] *See* John S. Carroll *et al.*, *Sentencing Goals, Casual Attributions, Ideology, and Personality*, 52 J. Personality & Soc. Psychol. 107 (1987); Shari S. Diamond & Hans Zeisel, *Sentencing Councils: A Study of Sentence Disparity and Its Reduction*, 43 U. Chi. L. Rev. 109, 114 (1975); Anthony Partridge & William B. Eldridge, Federal Judicial Center, *The Second Circuit Study: A Report to the Judges of the Second Circuit* 36 (1974); Brian Forst & Charles Wellford, *Punishment and Sentencing: Developing Sentencing Guidelines Empirically From Principles of Punishment*, 33 Rutgers L. Rev. 799, 813 (1981); *see also* Kevin Clancy *et al.*, *Sentence Decisionmaking: The Logic of Sentence Decisions and the Extent and Sources of Sentence Disparity*, 72 J. Crim. L. & Criminology 524 (1981).

ble Guidelines range, *id.* § 3553(a)(4); the Commission's policy statements, *id.* § 3553(a)(5); "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," *id.* § 3553(a)(6); and "the need to provide restitution to the victims of the offense," *id.* § 3553(a)(7).

B. The Congressionally Directed Mission Of The Sentencing Commission

In directing the implementation of those statutory mandates, Congress created an agency within the judicial branch, to which it delegated the task of establishing a set of uniform sentencing policies and practices to be used as guidelines by judges in choosing specific sentences within the wide statutory ranges set out in Title 18 of the U.S. Code. To prevent the appearance of partisanship from affecting that process, Congress directed that "[n]ot more than four" of the Commission's seven voting members "shall be members of the same political party." 28 U.S.C. § 991(a). In keeping with the bipartisan spirit of the Act, Congress did not adopt a single philosophy of sentencing, nor did it encourage the Commission to do so. Instead, it charged the Commission with assuring that each of the four often-competing purposes of punishment – retribution, deterrence, incapacitation, and rehabilitation, *see* 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b)(1)(A) – is adequately met.

Congress directed the Commission to develop sentencing ranges for specific categories of offenses involving similarly situated defendants. It specified that the maximum of a range generally should "not exceed the minimum of that range by more than the greater of 25 percent or 6 months." 28 U.S.C. § 994(b)(2). Congress fully expected that "there [would] be numerous guideline ranges, each range describing a somewhat different combination of offender characteristics and offense circumstances," including "several guideline ranges for a single offense varying on the basis of aggravating and mitigating circumstances." S. Rep. No. 98-225, at 168. Congress intended

that there "be a complete set of guidelines that covers in one manner or another all important variations that commonly may be expected in criminal cases, and that reliably breaks cases into their relevant components and assures consistent and fair results." *Id.*

Upon implementation of the Guidelines, Congress required the Commission's work to be a continually evolving process based on experience and empirical study, producing policies that "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(C).

C. The Range Of Factors Congress Directed The Commission To Consider

Congress directed the Commission to consider seven factors – all of which have been traditionally considered by judges in sentencing – in formulating offense categories: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. *See* 28 U.S.C. § 994(c)(1)-(7).

Congress also identified 11 offender characteristics, such as age, education, vocational skills, physical condition (including drug dependence), and family and community ties, and instructed the Commission to decide whether those characteristics "have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence." *Id.* § 994(d)(1)-(11). Congress prohibited the Commission from considering the "race, sex, national origin, creed, and socioeconomic status of offenders." *Id.* § 994(d). It further specified that, "in recommending a term of imprisonment or length of a term of imprisonment," the Guidelines should reflect the "general inappropriateness" of considering certain other factors that might serve as proxies for forbidden factors, such as

education, vocational skills, employment record, and family and community ties. *Id.* § 994(e).

The Act provided the Commission with an extensive list of other specific instructions, often requiring the Commission to strike a balance between competing policy goals. *See id.* §§ 991(b), 994(a)-(*o*). For example, the Act directed the Commission to "insure that the guidelines reflect the fact that, in many cases, current sentences do not accurately reflect the seriousness of the offense." *Id.* § 994(m). At the same time, however, Congress cautioned the Commission to "minimize the likelihood that the Federal prison population will exceed the capacity of the Federal prisons." *Id.* § 994(g).

SUMMARY OF ARGUMENT

I. The courts of appeals are correct to accord a presumption of reasonableness to a Guidelines sentence because the Guidelines are the product of a comprehensive and collaborative process to implement the directives in the Sentencing Reform Act of 1984 and subsequent legislation. The Commission has faithfully carried out its legislative mandate according to procedures that are thorough and transparent. During more than 20 years of work, the Commission has amassed a considerable expertise, informed by data collected from hundreds of thousands of past sentencing decisions and extended, rigorous debate between all sectors of the criminal justice system. Applying its congressionally delegated policy judgment to the results of its continuous empirical research, the Commission has produced an evolving set of Guidelines, the application of which produces a sentence that is reasonable in relation to Congress's purposes and comports with congressional sentencing prerogatives.

Courts of appeals should presume that application of the Guidelines produces reasonable sentences. Both Congress and this Court have recognized that the Commission is to play a principal role in crafting federal sentencing policy. Presuming the reasonableness of a Guidelines sentence properly acknowledges that role. A presumption

of reasonableness on appeal does not, as petitioners suggest, reinstate a mandatory Guidelines regime. As the Commission's data show, in those circuits that have adopted a presumption of reasonableness, there has been no discernible effect on the rate at which district courts voluntarily choose to adhere to the Guidelines. Likewise, in those circuits that have declined to adopt a presumption, no increase in sentences outside the Guidelines range can be detected.

II. The arguments against a presumption of reasonableness are unpersuasive. Petitioners and their *amici* claim that Guidelines ranges do not incorporate the factors that a sentencing judge must consider in imposing a sentence under 18 U.S.C. § 3553(a). But that contention misunderstands the structure of the Sentencing Reform Act. The Act guided the Commission in integrating the purposes of sentencing into a workable sentencing structure. *See* 28 U.S.C. §§ 991, 994. As the First Circuit has recognized, the Guidelines "are the only *integration* of the *multiple* [§ 3553(a)] factors." *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc).

ARGUMENT

I. AN APPELLATE COURT IS CORRECT TO APPLY A PRESUMPTION OF REASONABLENESS TO A SENTENCE WITHIN THE GUIDELINES

A. The Process That Produced The Guidelines Evidences The Reasonableness Of Sentences That Follow The Guidelines

In promulgating and amending the Guidelines, the Commission has diligently pursued a thorough and reasoned administrative process, designed to be collaborative and transparent. Application of the Guidelines resulting from that process produces a reasonable sentence that incorporates the purposes of sentencing that Congress articulated in the Sentencing Reform Act of 1984.

1. The Commission chose an appropriate starting point for the Guidelines framework

As it began to draft the Guidelines, the Commission chose to tap the collective expertise of federal judges. *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 17-18 (1988) ("Breyer, *Key Compromises*") (explaining the basis for that decision). Sentencing judges routinely balanced the competing purposes of punishment and of any mitigating and aggravating factors. By drawing averages from thousands of past sentencing decisions and examining data in tens of thousands of cases, the Commission was able to reduce disparity (the very definition of averaging), while striking a reasonable balance between the purposes of punishment. *See* USSC, *Report to Congress: Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 16 (June 1987) ("Supp. Report"). That analysis allowed the Commission to discern what offense and offender characteristics tended to affect the sentencing decision, and to what extent. The Commission assigned "weights" to those relevant factors that traditionally have been considered appropriate sentencing factors, thereby guiding courts in determining how each factor should affect the calculation of the sentence. *See* USSC, *Guidelines Manual* § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)) (2006) ("USSG"); *see also* 18 U.S.C. § 3661.

2. The Commission promulgated the initial Guidelines in a transparent, collaborative process

From the outset of its work, the Commission was committed "to developing sentencing guidelines informed by the widest measure of public comment." Draft of Sentencing Guidelines, 51 Fed. Reg. 35,080 (Oct. 1, 1986) (preliminary notice). To that end, the first Commission decided that all of its regular meetings would be open to the public. *See* Meeting Policy, 51 Fed. Reg. 11,869 (Apr. 7, 1986) (notice). The Commission established advisory

and working groups, which included representatives from United States Attorneys offices, state district attorneys, federal probation officers, defense attorneys, scholars, and federal judges. *See* 51 Fed. Reg. at 35,080, 35,082. The Commission invited these groups (including three groups of federal judges) to participate in working sessions with Commission members and staff to examine early drafts of the Guidelines and to opine on the important drafting issues facing the Commission. *See id.* at 35,082-83. The Commission also obtained information from a wide array of sources, through solicitations to federal and state agencies, and in public hearings.[3] *See id.* at 35,083.[4]

After those hearings, the Commission published a preliminary draft of the Guidelines. *See* 51 Fed. Reg. at 35,080. Although not required by Congress to do so, publication provided the Commission with "a vehicle for focused critical analysis and public comment." *Id.* at 35,081. The Commission received and considered comment from hundreds of groups and individuals. *See id.* Those comments led the Commission to issue a revised draft of the Guidelines in February 1987. *See* Proposed Sentencing Guidelines and Policy Statements, 52 Fed. Reg. 3920 (Feb. 6, 1987) (notice). After a third set of

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[3] The Commission conducted a series of topical public hearings concerning the Guidelines. *See* Hearing Notices: 51 Fed. Reg. 11,869 (Apr. 7, 1986) (pertaining to offense seriousness); 51 Fed. Reg. 17,850 (May 15, 1986) (treatment of prior criminal record); 51 Fed. Reg. 19,918 (June 3, 1986) (organizational sanctions); 51 Fed. Reg. 24,781 (July 8, 1986) (sanctions other than incarceration); 51 Fed. Reg. 33,338 (Sept. 19, 1986) (plea agreements). The attendees included representatives of the executive and judicial branches of government, the defense bar, other participants in the federal criminal justice system, and public interest groups, among others. The complete list of attendees may be found in Appendix A of the Supplementary Report.

[4] The Commission also examined existing state guidelines systems, *see* Supp. Report at 14, but ultimately concluded that "[s]tate guidelines systems which use relatively few, simple categories and narrow imprisonment ranges . . . are ill suited to the breadth and diversity of federal crimes," *id.*; *see also* USSG § 1A1.1 cmt. background (Intro. and Gen. App. Principles (A)(4)(a)).

revisions, the Commission submitted the Guidelines and policy statements to Congress. *See* Sentencing Guidelines for United States Courts, 52 Fed. Reg. 18,046 (May 13, 1987) (notice). The Guidelines became effective on November 1, 1987, after a six-month period of congressional review. *See* 18 U.S.C. § 3551 note.[5]

3. The Commission continues to amend the Guidelines, subject to congressional approval, based on judicial experience and empirical study

Congress expected the Commission continually to revise the Guidelines "to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing." S. Rep. No. 98-225, at 77; *see* 28 U.S.C. § 994(*o*); *see also Braxton v. United States*, 500 U.S. 344, 348 (1991) ("Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial interpretations might suggest."). The Commission recognized Congress's expectation, explaining that the Guidelines would be "refined and amended as practical experience, analysis, and logic dictate." 52 Fed. Reg. at 3921. Consistent with Congress's direction, the Commission has amended the Guidelines – 696 times, to date – in response to a variety of considerations, including court decisions, congressional directives, formal and informal input from federal judges, prosecutors, defense attorneys, probation officers, academics, and other interested groups, and the Commission's own evaluations of needed refinements. *See* USSG App. C & Supp.[6]

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[5] The Guidelines were not fully implemented until after *Mistretta v. United States*, 488 U.S. 361 (1989), in which this Court upheld the Act against a challenge that it violated the separation of powers.

[6] For example, the Commission has amended the Guidelines at least 25 times in response to circuit conflicts alone. *See* USSG App. C, amends. 484, 487, 493, 549, 577, 579, 580, 581, 582, 583, 591, 597, 602, 603, 604, 613, 614, 615, 617, 630, 632, 634, 635, 645, 660. That amendment process has been noted by this Court, and frequently

In the aftermath of this Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), for example, the Commission analyzed post-*Booker* cases and prepared a report to Congress on its findings. The Commission is actively looking at some of the issues raised in the report and has made addressing those issues part of its priorities for the 2006-2007 amendment cycle and beyond.[7] This evolutionary process, steadily updating the Guidelines upon the basis of empirical research, expert analysis, and congressional directives, is precisely the work of the Commission this Court identified in *Booker* as essential to "promot[ing] uniformity in the sentencing process." 543 U.S. at 263.

Data collected by the Commission have provided empirical support for congressional action as well as Commission amendments. For example, the Commission's data provided the primary impetus for Congress's enactment of the statutory safety-valve provision at 18 U.S.C. § 3553(f), which permits the imposition of a Guidelines sentence without regard to a statutory mandatory minimum sentence in certain cases. *See* H.R. Rep. No. 103-460, at 4 & n.5 (1994) (citing USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Aug. 1991) ("*Mandatory Penalties Report*")); *see also* William W. Wilkins, Jr. & John R.

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invoked by the Solicitor General as a reason not to grant certiorari to resolve circuit conflicts on issues arising under the Guidelines. *See Braxton*, 500 U.S. at 348.

[7] For example, the Commission's *Final Report on the Impact of United States v. Booker on Federal Sentencing* (Mar. 2006) ("*Booker Final Report*") identified issues associated with criminal history as one of the top reasons for all types of below-range sentences in the post-*Booker* era. Moreover, in 2004, the Commission staff completed an empirical study on recidivism rates and first offenders, the results of which provided an additional basis for reconsideration of the Guidelines' treatment of criminal history. *See* USSC, *Recidivism and the "First Offender"* (May 2004). Accordingly, the Commission has included a review of criminal history as one of its final priorities in the 2006-2007 amendment cycle. *See* Final Priorities, 71 Fed. Reg. 56,578 (Sept. 27, 2006) (notice).

Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 Wash. & Lee L. Rev. 63, 65 (1993) ("Wilkins, *Role of Sentencing Guideline Amendments*").[8]

In addition to its extensive data analysis, the Commission solicits input on possible amendments from stakeholders in the criminal justice system. *See* 28 U.S.C. § 994(*o*) (directing the Commission to consult "with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system"). Sentencing judges have been a particularly valuable source of information. After the Criminal Law Committee of the Judicial Conference expressed concerns to the Commission about the Guidelines' treatment of economic crimes, for example, the Commission undertook a multi-year study, including extensive field testing with federal judges and probation officers of a new proposed loss definition. Based on that research, the Commission consolidated the theft and fraud guidelines, and promulgated a new common loss table. *See* USSC, *A Field Test of*

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[8] The Commission's use of sentencing data is evidenced in many of its "Reasons for Amendment[s]," explanations that accompany each amendment to the Guidelines. *See, e.g.*, USSG App. C, amends. 374, 450, 531, 555, 592, 596, 597, 624, 648, 652, 663, 678. Commission reports and working papers are also replete with examples of the Commission's use of sentencing data. *See, e.g.*, USSC, *Report to Congress: Increased Penalties under the Sarbanes-Oxley Act of 2002* (Jan. 2003); USSC, *Report to Congress: Adequacy of Federal Sentencing Guidelines Penalties for Computer Fraud and Vandalism Offenses* (June 1996); USSC, *Intellectual Property Amendments: 2006 Policy Development Team Report* (May 2006); USSC, *2006 Steroids Report* (Mar. 2006).

The Commission also uses the data to (1) provide prison impact assessments to Congress as required under 18 U.S.C. § 4047; (2) "publish data concerning the sentencing process"; and (3) "collect systematically and disseminate information concerning sentences actually imposed, and the relationship of such sentences to the factors set forth in section 3553(a)." 28 U.S.C. § 995(a)(14), (15). Examples of such publications include USSC, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) ("*Fifteen-Year Report*"), and *Booker Final Report*.

Proposed Revisions to the Definition of Loss in the Theft and Fraud Guidelines: A Report to the Commission (Oct. 1998). Similarly, the 2001 amendment to § 2L1.2 (Unlawfully Entering or Remaining in the United States) was prompted by "concerns raised by a number of judges, probation officers, and defense attorneys, particularly in districts along the southwest border." USSG App. C, amend. 632.

When the Commission acts upon that information, it employs a transparent amendment process. Each year, the Commission publishes a notice of possible policy priorities for the regular amendment cycle, seeking public comments. *See, e.g.*, Sentencing Guidelines for United States Courts, 71 Fed. Reg. 44,344 (Aug. 4, 2006) (notice). After reviewing public comments, the Commission votes on the priorities and publishes a notice of final priorities. *See, e.g.*, 71 Fed. Reg. at 56,578. It then engages in an open process, with public hearings and comment, before promulgating amendments. *See, e.g.*, Proposed Amendments, 71 Fed. Reg. 4782 (Jan. 27, 2006) (notice; request for public comment; notice of public hearings); *see also* USSC Rules of Practice and Procedure 3.4, 4.3, 4.4, 4.5; 28 U.S.C. § 994(p) (specifying 180-day congressional review period).

Congress has not hesitated either to disapprove of Commission decisions with which it does not agree[9] or to direct the Commission to take action on matters it deems important.[10] On the whole, however, Congress has time and again approved the Guidelines and the numerous amendments to them, reaffirming its confidence in the Commission as its delegate in crafting sentencing policy.

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[9] *See, e.g.*, Act of Oct. 30, 1995, Pub. L. No. 104-38, 109 Stat. 334 (disapproving a Guidelines amendment that would have equalized the Guidelines penalties for powder cocaine and crack cocaine offenses based solely upon drug quantity).

[10] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 905, 116 Stat. 745, 805-06 (directing the Commission to make various changes to the Guidelines, including increasing penalties for offenders who commit corporate crimes).

See United States v. Mykytiuk, 415 F.3d 606, 607 (7th Cir. 2005) ("[t]he Sentencing Guidelines represent at this point eighteen years' worth of careful consideration of the proper sentence for federal offenses"). Based as they are on analysis from hundreds of thousands of cases and years of expert study, the Guidelines ranges represent reasonable choices that comport with congressional purposes in the Act and subsequent legislative directives.

B. An Appellate Court's Presumption That A Sentence Within The Guidelines Range Is Reasonable Gives Appropriate Recognition To Congress's Intent For The Commission To Play A Continuing Role In Federal Sentencing

1. When a district court concludes with respect to a particular defendant that the Guidelines adequately account for all of the legally relevant sentencing factors and that the defendant fits well into a Guidelines category – and therefore ought to be treated like other offenders falling within that category – the court of appeals should presume that the resulting sentence is reasonable. Application of a presumption of reasonableness to a sentence within the Guidelines range recognizes the Commission's extensive efforts to produce a rational sentencing system that incorporates the collective knowledge and experience of all of the participants in the criminal justice system, just as Congress intended. A sentencing judge, utilizing the Guidelines, is significantly better able to marshal all of that systemic information in arriving at a reasonable (and reasonably uniform) outcome. Following the Guidelines provides the benefit of the Commission's thorough process and produces regularized sentencing outcomes, thus fulfilling Congress's central purpose of reducing unwarranted disparity.

Because the Commission was charged with striking an appropriate balance between numerous competing policy goals, taking into account the views of opposing forces in the criminal justice system, the Guidelines inevitably represent a set of compromises. As with all compromises,

some stakeholders may have been left with the sense that the Guidelines are not perfect. But, as the original Commissioners learned, in sentencing policy, the perfect can be the enemy of the good. *See* Breyer, *Key Compromises* at 2, 8-12. Recognizing that a proper application of the Guidelines produces a "reasonable" sentence merely acknowledges that reasonableness is by definition a rough assessment of shared wisdom.

2. Presuming the reasonableness of a Guidelines sentence is consistent with *Booker*. In researching sentencing practices and refining the Guidelines, the Commission performs precisely the role that this Court envisioned for it in *Booker*. *Booker* severed only two subsections of the Act,[11] leaving in place the remainder of the sentencing system Congress devised[12] – a system in which the Guidelines play the central role. *See* 543 U.S. at 245. This Court explained that "[t]he system remaining after excision, while lacking the mandatory features that Congress enacted, retains other features that help to further [congressional] objectives." *Id.* at 264.

In particular, the Court stated that "the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly." *Id.* Thus, the Court validated the Commission's continued research and policymaking roles in carrying into effect Congress's primary goal of avoiding unwarranted disparity: "The Sentencing Commission will continue to collect and study appellate court decision-making. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices. It will thereby promote uniformity in the sentencing process." *Id.* at 263.

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[11] The standard of review contained in 18 U.S.C. § 3742(e) was one of the provisions of the Act struck down in *Booker*. *See* 543 U.S. at 245. The other was 18 U.S.C. § 3553(b), which made the Guidelines mandatory. *See id.*

[12] *See* 18 U.S.C. §§ 3551 *et seq.*; 28 U.S.C. §§ 991-998.

3. Contending that a Guidelines sentence is a reasonable sentence does not imply that a sentence outside the Guidelines range can never be reasonable. The Commission acknowledges that "it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to the sentencing decision." USSG § 1A1.1 cmt. background. Moreover, under § 3553(a), "sentencing decisions must be done case by case and must be grounded in case-specific considerations." *United States v. Pho*, 433 F.3d 53, 65 (1st Cir. 2006).[13]

C. Sentencing Data Show That According A Presumption Of Reasonableness To A Guidelines Sentence Does Not Frustrate Judicial Discretion

1. Petitioners argue that, when courts of appeals presume that Guidelines sentences are reasonable, district judges feel an irresistible pressure to follow the Guidelines, such that, even when judges view a non-Guidelines sentence as appropriate, they will select a within-Guidelines sentence for fear of being reversed on appeal. *See, e.g.*, Rita Pet. Br. 28 (arguing that "presumption . . . discourages courts from considering . . . information about the particular individual before the court"). Thus, petitioners claim, an appellate presumption of reasonableness renders the Guidelines effectively mandatory, in

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[13] Indeed, the Commission recommends that district judges follow a three-step process in sentencing after *Booker*: (1) calculate the Guidelines range; (2) consider the policy statements and the appropriateness of any departures from the applicable range; and (3) then consider whether a variance pursuant to § 3553(a) is appropriate. *See Booker Final Report* at 42. This process essentially is codified in the amended Statement of Reasons form issued by the Judicial Conference and approved by the Commission, which sentencing courts are statutorily required to use. *See* AO 245B (Rev. 06/05); 28 U.S.C. § 994(w)(1)(B) (as amended by the Combat Methamphetamine Epidemic Act of 2005, Pub. L. No. 109-177, Tit. VII, § 735(1), 120 Stat. 192, 271); *see also* proposed amended Fed. R. Crim. P. 11(b)(1)(M) (stating court's obligation "to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)").

violation of *Booker*. But the Commission's data refute that argument.

If petitioners' theory were correct, one would expect to see over time a significant and widening gap between the rate of below-Guidelines sentences in circuits with a presumption of reasonableness and the rate of such sentences in circuits without a presumption. On the contrary, the rate at which sentencing judges impose a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure in circuits that apply a presumption of reasonableness (87.5 percent) is quite close to the rate (83.9 percent) in circuits that apply no presumption. *See* App. 1a. And the difference in those rates has remained virtually unchanged since those circuits adopted the respective presumption rules. Even when the data are broken down by individual circuit, no meaningful trends are observable. *See* App. 2a-13a. Therefore, the empirical evidence, namely post-*Booker* rates of both departures and variances from the Guidelines sentence, demonstrates that applying an appellate presumption of reasonableness does not deter sentencing judges from exercising their discretion to impose a sentence outside of the applicable Guidelines range.

2. In 86 percent of all sentences handed down since *Booker*, judges have chosen a sentence either within the Guidelines range or below the Guidelines range pursuant to a government-sponsored departure. This post-*Booker* figure simply reflects the satisfaction with the Guidelines that sentencing judges expressed to the Commission before *Booker*. According to an extensive pre-*Booker* survey undertaken by the Commission, judges generally agreed that the Guidelines provide punishment levels that reflected the seriousness of the offense (18 U.S.C. § 3553(a)(2)(A)); afforded adequate deterrence to criminal conduct (*id.* § 3553(a)(2)(B)); protected the public from further crimes of the defendant (*id.* § 3553(a)(2)(C)); and avoided unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (*id.* § 3553(a)(6)). *See* Linda Drazga

Maxfield, USSC, *Final Report: Survey of Article III Judges on the Federal Sentencing Guidelines* I-1 & Apps. A, C (Mar. 2003). Thus, sentencing judges – who are the best authorities on the propriety of the Guidelines – told the Commission that, in most cases, the Guidelines range provided a reasonable sentence.

II. THE GUIDELINES RANGES INCORPORATE THE STATUTORY FACTORS THAT A SENTENCING JUDGE CONSIDERS IN IMPOSING A SENTENCE

Petitioners and their *amici* principally contend that Guidelines sentences should not be presumed reasonable because the Guidelines do not take into account the factors that, under 18 U.S.C. § 3553(a), a sentencing judge must consider in imposing a sentence. *See, e.g.*, National Association of Criminal Defense Lawyers ("NACDL") *Amicus* Br. 12-21. That claim misunderstands the Commission's practice and the Act, which directed the Commission to consider facts that encompass the § 3553(a) factors. *See* 28 U.S.C. §§ 991, 994. As it was instructed to do by Congress, the Commission has carefully considered the § 3553(a) factors in creating categories of common offense and offender characteristics, including various mitigating and aggravating circumstances.

A. The Guidelines Produce A Sentence That Is Sufficient, But Not Greater Than Necessary, To Carry Out The Purposes Of Sentencing

Section 3553(a) directs district courts to choose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing identified in the Act. Petitioners contend that, contrary to that directive, which is referred to as the "parsimony" provision, the Guidelines often recommend sentences greater than necessary to satisfy the statutory purposes of sentencing.

Petitioners are incorrect. The *Guidelines Manual* instructs sentencing courts to consider § 3553(a) when selecting a specific sentence within the Guidelines range. *See* USSG Ch. 5 intro. cmt. In more than 40 percent of

post-*Booker* cases sentenced within the applicable range, the sentencing court has selected a sentence *above* the minimum of the range, demonstrating that the low end of the range was not sufficient to meet the statutory purposes of sentencing. *See* USSC, *2005 Sourcebook of Federal Sentencing Statistics* 298 (2006); USSC, *Preliminary Quarterly Data Report* 38 (Dec. 2006).

In addition, Congress had the opportunity to disapprove every provision of the current Guidelines. It cannot be presumed that Congress permitted those provisions to take effect despite a belief that they were inconsistent with Congress's statutory directive in § 3553(a).

More fundamentally, petitioners' claim is inherently subjective. One cannot sensibly evaluate compliance with the parsimony provision without first making a judgment about what punishment is "necessary" and "sufficient." On that score, there will always be room for good-faith disagreements among reasonable people as to what sentence is appropriate for particular offenses and offenders.

Recognizing the Commission's role as a primary sentencing policymaker consistent with congressional intent, petitioners seek to support their reliance on the parsimony provision by citing Commission statements disagreeing with congressional mandates, such as mandatory minimum sentences and the disparity between sentences for powder cocaine and crack cocaine (the crack/powder ratio). *See* Rita Pet. Br. 36-37 (citing *Fifteen-Year Report* at 135). But the Commission and sentencing judges (like the petitioners) must abide by the will of Congress, even when they might prefer a different policy outcome. *Cf. United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006) ("[A]llowing sentencing courts to subvert Congress' clearly expressed will certainly does not promote respect for the law, provide just punishment for the offense of conviction, or result in a sentence reflective of the offense's seriousness as deemed by Congress."). It cannot be the case that a sentence is unreasonably high under

Congress's parsimony provision when Congress itself elsewhere made the choice for severity.[14]

B. The Guidelines Ranges Appropriately Consider The Nature And Circumstances Of The Offense

Section 3553(a)(1) requires sentencing judges to consider "the nature and circumstances of the offense." Congress directed the Commission to consider substantively equivalent factors in forming the Guidelines – namely, the aggravating and mitigating circumstances of the crime and the nature and degree of the harm caused by the crime. *See* 28 U.S.C. § 994(c)(1)-(3). Congress intended the sentencing judge to consider "such things as the amount of harm done by the offense, whether a weapon was carried or used, whether the defendant was a lone participant in the offense or participated with others in a major or minor way, and whether there were any particular aggravating or mitigating circumstance surrounding the offense." S. Rep. No. 98-225, at 75. The Commission incorporated those same considerations into the Guidelines. *See generally* USSG §§ 2B1.1, 2K2.4, 3B1.1, 3B1.2.

Petitioners contend, however, that only the sentencing judge can appropriately consider the nature and circumstances of the particular offense at issue. They claim that the Guidelines are a mechanical, arithmetic exercise, the product of which is insufficiently sensitive to the individual case. *See* Rita Pet. Br. 10. But that criticism misunderstands the Guidelines. Application of the Guidelines involves discretionary determinations by the district judge at every turn. For example, USSG § 3B1.2 requires the district court to consider the defendant's "role in the

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[14] In seeking to assure that sentences are no higher than necessary, the Commission has at times sought to persuade Congress to adopt less severe penalties, with some success. For example, the Commission has long opposed mandatory minimum penalties for drug trafficking offenses. Relying on its empirical research, Congress responded to the Commission's recommendation by passing the "safety valve" provision, by which offenders with a minimal criminal history can escape the mandatory minimum if they meet certain criteria. *See* USSG § 5C1.2.

offense," which includes mitigation of, enhancement of, or no change to the offense level.[15] The Guidelines are replete with instances in which the district court must assess the nature and circumstances of the offense and the offender.

Amicus New York Council of Defense Lawyers ("NYCDL") contends that the Guidelines place disproportionate emphasis on drug quantity to the exclusion of other relevant factors. *See* NYCDL Br. 10 (*Claiborne*, No. 06-5618). But, as the *Fifteen-Year Report* explains, while the Commission was drafting the original Guidelines, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"), including stiff 5- and 10-year mandatory minimum penalties keyed to specific drug quantities. To avoid so-called sentencing "cliffs," where a trivial change in quantity has a dramatic effect on the sentence, the Commission chose to "link the quantity levels in the ADAA to guideline ranges corresponding to the five- and ten-year mandatory minimum sentences." *Fifteen-Year Report* at 49. Had the Commission "given more weight to other potentially relevant factors, such as an offender's role within the drug trafficking organization," *id.*, as NYCDL urges (at 20-21 (*Rita*, No. 06-5754)), then sentences under the Guidelines would not have reflected the seriousness of the offense as determined by Congress's mandatory minimum sentences.

C. In Keeping With The Directives Of The Act, The Guidelines Account For The History And Characteristics Of The Defendant

Section 3553(a)(1) also directs the court to consider the "history and characteristics of the defendant." Petitioners

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[15] The mitigating role adjustments, for example, leave it to the district court to decide whether that role was "minimal" (in which case the offense level is reduced by four levels) or "minor" (warranting a reduction of only two levels). Moreover, a difference of up to four levels has no small effect on the sentence: the Guidelines range for an offender with no criminal history and an offense level of 16 would be 21-27 months; reducing the offense level to 12 would potentially cut the sentence in half, with a range of 10-16 months.

argue (Rita Pet. Br. 20-21; Claiborne Pet. Br. 20) that the Commission failed sufficiently to integrate that factor into the Guidelines because it prohibited or discouraged consideration of certain individual characteristics that petitioners assert are relevant to the sentencing determination. They cite examples such as include age, marital status, gender, employment, and family ties. Petitioners and their *amici* fail to consider the context of the Act as a whole and the congressional concerns that led to its passage.

1. Congress feared that the evident disparities in sentencing resulted from discrimination. The Act accordingly directed the Commission to "assure that the guidelines and policy statements [be] entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(d). And the legislative history made it "absolutely clear" that it would be inappropriate to "afford preferential treatment to defendants of a particular race or religion or level of affluence, or to relegate to prisons defendants who are poor, uneducated, and in need of education and vocational training." S. Rep. No. 98-225, at 171. Thus, the Commission understood that "the imposition of different sentences based on such factors as race, sex, national origin, creed, or socio-economic status, on defendants with similar records who have been found guilty of similar conduct, constitutes a form of unwarranted disparity." William W. Wilkins, Jr., Phyllis J. Newton & John R. Steer, *The Sentencing Reform Act of 1984: A Bold Approach to the Unwarranted Sentencing Disparity Problem*, 2 Crim. L.F. 355, 368 (1991).

Implementing Congress's command, the Commission endeavored "to ensure that other considerations, possibly associated with a defendant's race or personal status, are not used to 'camouflage' the improper use of those factors as to which the statute mandates neutrality." *Id.* at 371. Thus, the Commission decided to prohibit or discourage consideration of certain other offender characteristics, such as "lack of youthful guidance." *See* Wilkins, *Role of Sentencing Guideline Amendments* at 83-85. That

decision was reasonably calculated to reduce unwarranted disparity and to balance the competing purposes of sentencing in § 3553(a)(2).

In addition to those prohibited considerations, Congress specifically discouraged consideration of several of the other offender characteristics about which petitioners complain, instructing the Commission that the Guidelines should "reflect the general inappropriateness" of considering "education, vocational skills, employment record, family ties and responsibilities, and community ties," in determining whether or for how long a defendant should be imprisoned. 28 U.S.C. § 994(e).

As a matter of construction, Congress likely did not mean to *require* the sentencing judge under § 3553(a) to consider offender characteristics that it elsewhere in the Act discouraged the Commission from incorporating into the Guidelines ranges. Although the directives in § 994 are aimed principally at the Commission, judges, who are familiar with principles of statutory interpretation, do not act unreasonably in concluding that, where § 3553(a) says "history and characteristics of the defendant," that phrase should not be read to include such characteristics as are declared elsewhere in the Act to be "general[ly] inappropriate[]" considerations. *See, e.g., Simpson v. United States*, 435 U.S. 6, 15 (1978) ("more specific" statutory provision must be given "precedence" over "general" provision).

2. Even putting aside Congress's specific instructions to the Commission about which offender characteristics to consider, Congress generally delegated to the Commission the job of choosing, on a uniform basis, those offender characteristics that should be considered in the sentencing decision, and to what extent. Listing 11 specific factors, Congress charged the Commission with deciding "whether [these] matters, *among others*, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and [the Commission] shall take them into account only to

the extent they do have relevance." 28 U.S.C. § 994(d) (emphasis added).

The Commission has carried out that command. It has found some factors appropriate to consider (*e.g.*, role in the offense, criminal history)[16] and others not (*e.g.*, drug dependence, employment record). Because Congress expressly entrusted such questions to the Commission, it is presumptively reasonable for a district court to follow the Commission's decisions.

3. Petitioners assert that certain of the offender characteristics excluded from the Guidelines, such as age in particular, may be predictive of recidivism and therefore must be considered by the sentencing judge under § 3553(a), because one of the purposes of sentencing listed there is "protect[ing] the public from further crimes of the defendant." 18 U.S.C. § 3553(a)(2)(C). But addressing recidivism is only *one* of the statutory purposes of sentencing. The Guidelines were designed to balance all four (often competing) statutory purposes of sentencing in § 3553(a)(2), and the Guidelines' treatment of criminal history accordingly reflects not only the risk of recidivism, but also the culpability of the offender. *See* Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 Fed. Sent. R. 192, 1997 WL 725695, at *3 (Jan./Feb. 1997) ("[T]he Sentencing Commission determined that it would only include factors that could be supported by both a just dessert and predictive rationale.").

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[16] Other offender characteristics determined by the Commission to be relevant to the purposes of sentencing – including abuse of a position of trust or use of a special skill in committing the offense, obstructing the administration of justice, and acceptance of personal responsibility for the criminal conduct – are factored into the applicable Guidelines range. *See* USSG §§ 3B1.3, 3C1.1, 3E1.1. Thus, the Commission has considered and incorporated relevant characteristics of the defendant into the Guidelines. Moreover, judges have always been free to consider other non-discriminatory offender characteristics in choosing a specific sentence *within* the Guidelines range.

Accordingly, instead of independently considering age (which has no bearing on culpability), the Commission decided to adopt a "decay" factor in its criminal history guideline. *See* USSG § 4A1.2(d)-(e). It determined that, the older a prior conviction, the less that conviction would raise an offender's criminal history score. Thus, prior convictions committed before a defendant reached 18 years old are treated less severely than offenses committed as an adult; a prior conviction for which a defendant received a sentence of less than 13 months of imprisonment is not considered if it is more than 10 years old; and prior convictions for which a defendant received a longer sentence are not considered when the defendant was released more than 15 years before the instant offense. *See id.* That approach accounts for the lower rate of recidivism among older offenders, while ensuring that older offenders with recent convictions are given a sentence that reflects their greater culpability.

D. The Guidelines Appropriately Balance The Statutory Purposes Of Punishment

Section 3553(a)(2) requires the sentencing judge to consider four purposes of punishment. *Amicus* NACDL contends (at 4-5, 14) that the Commission's failure to adopt any unifying philosophy of sentencing supports an inference that the Commission somehow gave up on considering the purposes of punishment. On the contrary, the Guidelines' failure to adopt a single "philosophy" of punishment is consistent with Congress's direction that the Guidelines account for all four purposes of punishment: "It should be clear that the Commission never made a commitment to choose a particular rationale, because such a commitment would be inconsistent with the statutory mandate of multiple purposes." Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. Crim. L. & Criminology 883, 917 (1990) ("Nagel, *Structuring Sentencing Discretion*").[17]

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[17] *See also* William W. Wilkins, Jr., *The Federal Sentencing Guidelines: Striking an Appropriate Balance*, 25 U.C. Davis L. Rev. 571, 586

Moreover, the Commission has explained how it has taken the statutory purposes of punishment into account in formulating the Guidelines. For example, under § 3553(a)(2)(A), a sentence should "reflect the seriousness of the offense"; "promote respect for the law"; and "provide just punishment for the offense." To that end, the Guidelines assign each crime a score as a starting point in assessing the seriousness of the offense. *See Fifteen-Year Report* at 12. That score is then increased or decreased to account for the harm caused by the offense and the culpability of the offender. *See id.* at 13. The Commission "has used a wide variety of information to assess crime seriousness, including survey data on public perceptions of the gravity of different offenses, analysis of various crimes' economic impacts, and medical and psychological data on the harm caused by drug trafficking, sexual assaults, pollution, and other offenses." *Id.*

In short, the Commission has continually measured its policies against the purposes of punishment. For example, the *Guidelines Manual* addresses how the criminal history rules are designed to address all four purposes of punishment. *See* USSG Ch. 4 intro. cmt.; *id.*, App. C, amend. 617 (increasing penalties in high-level fraud offenses because of the seriousness of offender culpability, but decreasing sentences for lower-level frauds to enhance the likelihood that the defendant will provide restitution).[18]

(1992) ("The guidelines strike an appropriate balance between the[] competing concerns [reflected in the four purposes of sentencing] in attempting to achieve the ends Congress envisioned in establishing the Sentencing Commission.").

[18] Other official Commission publications reflect that the Commission remains cognizant of its obligation to consider the four purposes of sentencing when promulgating guidelines. *See, e.g., Mandatory Penalties Report* at 18 ("The [Commission] will use its substantial research authority to examine the effects of sentencing guidelines on the purposes of sentencing as set forth at 18 U.S.C. § 3553(a)(2), and such topics as deterrence, recidivism, and selective incapacitation.") (footnotes omitted); *Fifteen-Year Report* at 12-13 (discussing how the Guidelines reflect the statutory purposes of punishment).

E. The Guidelines Reflect The Kinds Of Sentences Available

Section 3553(a)(3) instructs the sentencing court to consider the kinds of sentences available. Congress was concerned that "prison sentences are imposed in cases where equally effective sentences involving less restraint on liberty would serve the purposes of sentencing." S. Rep. No. 98-225, at 77. Of equal concern to Congress, however, was the likelihood that "some major offenders, particularly white collar offenders and serious violent crime offenders, frequently do not receive sentences that reflect the seriousness of their offenses." *Id.*; *see also* 28 U.S.C. § 994(m).

In producing the Guidelines, the Commission considered the kinds of sentences available. Its staff traveled across the Nation to obtain information and advice from states and communities in which a variety of sentencing options other than imprisonment were being used. *See supra* pp. 7-9. The Commission incorporated its consideration of the kinds of sentences available into the Sentencing Table directly, by the creation of Zones A through D. *See* USSG Ch. 5, Pt. A. Specifically, a court may sentence offenders in Zone A to probation only or to probation with various confinement conditions, such as intermittent confinement, community confinement, or home detention. For offenders in Zone B, some type of confinement condition is recommended, but it may be entirely intermittent, community, or home confinement accompanied by probation. By contrast, for offenders in Zone D, a term of imprisonment equal at least to the minimum of the Guidelines range is recommended. That incremental escalation of penalties based on offense level and criminal history is an entirely reasonable implementation of Congress's directive to consider the types of sentences available.

F. The Guidelines Reduce Unwarranted Sentencing Disparities

Section 3553(a)(6) instructs the sentencing judge to consider "the need to avoid unwarranted sentence disparities

among defendants with similar records who have been found guilty of similar conduct." Congress directed the Commission to consider the same factor. *See* 28 U.S.C. § 991(b)(1)(B). Petitioners and their *amici* argue, however, that the Guidelines do not sufficiently reduce disparity in sentences.

1. The best empirical evidence from the pre-*Booker* era refutes that claim. A "convergence of findings by researchers both inside and outside the Commission" showed that the Guidelines had reduced judge-created disparity: "The conclusion is clear: the federal sentencing guidelines have made significant progress toward reducing disparity caused by judicial discretion." *Fifteen-Year Report* at 99 (citing Paul J. Hofer, Kevin R. Blackwell & R. Barry Ruback, *The Effect of the Federal Sentencing Guidelines on Inter-Judge Sentencing Disparity*, 90 J. Crim. L. & Criminology 239 (1999), and James M. Anderson, Jeffrey R. Kling & Kate Stith, *Measuring Interjudge Disparity: Before and After the Federal Sentencing Guidelines*, 42 J.L. & Econ. 271 (1999)).

2. In focusing on disparities like the crack/powder ratio, petitioners misapprehend the intended purpose of § 3553(a)(6), which was to reduce *unwarranted* disparity. Critically, the crack/powder disparity was established by *Congress*. The unwarranted disparity of which Congress spoke in § 3553(a)(6) was not *congressionally mandated* disparity, such as crack/powder disparity, or disparity created by congressionally mandated "fast track" programs (*see* USSG § 5K3.1), but rather the disparities that arose between and among individual sentencing judges.

Congress defined unwarranted sentencing disparity in the Act: "defendants with *similar criminal records* found guilty of *similar criminal conduct* receiv[ing] *dissimilar* sentences." II USSC, *The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining* 269 (Dec. 1991) ("*1991 Report*") (citing 28 U.S.C.

§ 991(b)(1)(B)). Congress was particularly concerned about the disparity created when "judges sentence on the basis of their personal criminal philosophies and assign different weights to such factors as a defendant's criminal history, role in the offense and use of a weapon." *Id.* at 273. "[T]he disparity found to characterize federal sentencing was thought to sometimes mask, and be correlated with, discrimination on the basis of a defendant's race, sex, or social class." Nagel, *Structuring Sentencing Discretion* at 883-84; *see id.* at 884 ("For a system claiming equal justice for all, disparity was an inexplicable, yet constant source of embarrassment.").

Just as Congress has mandated different sentences for different types of cocaine, it has imposed mandatory-minimum penalties for certain offenses.[19] Thus, in certain cases, Congress has mandated disparate treatment of offenders with similar criminal records who engage in seemingly similar criminal conduct. But, when "[d]isparity . . . [has been] deliberately created by [Congress] for public policy reasons," II *1991 Report* at 273, that disparity cannot be considered *unwarranted* within the meaning of § 3553(a)(6). When sentencing a defendant, the judge's consideration of unwarranted disparity under § 3553(a)(6) should be limited to the disparity defined by Congress in the Act. Defendants with similar criminal records found guilty of similar criminal conduct should

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[19] The Commission does not necessarily share Congress's policy preferences. The Commission has long opposed mandatory minimum sentences and has counseled Congress that the requirement of such penalties undercuts the goals of the Act. *See Mandatory Penalties Report* at 33-34. The Commission has also repeatedly recommended to Congress that it change the current cocaine sentencing scheme. *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) (as directed by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796); USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997) (as directed by Pub. L. No. 104-38); USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002). The Commission's work in this area continues during the current amendment cycle.

receive similar sentences, except when (as in the case of crack/powder) Congress has provided otherwise.

3. NYCDL argues (at 19-20 (*Rita*, No. 06-5754)) that the Guidelines do not adequately address the need to reduce regional disparity. NYCDL bases this argument on a mischaracterization of the Commission staff's *Fifteen-Year Report*. Although the *Fifteen-Year Report* acknowledges that regional disparities exist, the report explains that those disparities often resulted from *circumvention* of the Guidelines at the pre-sentencing stages. *See Fifteen-Year Report* at 88-89. To the extent that the disparity that NYCDL identifies results from a failure to follow the Guidelines, it provides no basis for concluding that Guidelines sentences are not presumptively reasonable.

Even the "most troubling" evidence of regional disparity noted in the *Fifteen-Year Report* – namely, that the impact of the offender's city on his sentence had increased since the implementation of the Guidelines, *see id.* at 98 – cannot readily be ascribed to the Guidelines. The studies that identified the correlation between city and sentence coincided with another major policy shift. In the ADAA, Congress – and in turn the Commission – placed a far greater emphasis on drug quantity in determining the sentence. *See* 21 U.S.C. § 841(b). Because drug cases "are not randomly assigned to cities," Congress's emphasis on quantity risked creating "greater disparity between small cities and large cities, which are distribution centers for larger quantities." *Id.*

In any event, most regional disparities result from the exercise of prosecutorial discretion, for reasons that are readily understandable. A drug bust recovering 20 pounds of marijuana may grab prosecutors' attention in rural South Carolina, whereas in Brooklyn the case may not be treated as extraordinary. Even once charges are brought, the plea bargaining process presents ample opportunity to avoid the Guidelines' goal of "real offense"

sentencing by permitting compromises on facts such as drug quantity or amount of loss.[20]

In response, the Commission has recommended that judges accept only those pleas that "adequately reflect the seriousness of the actual offense behavior . . . [such that] accepting the agreement will not undermine the statutory purposes of sentencing or the sentencing guidelines." USSG § 6B1.2(a). And the Guidelines' "relevant conduct" rule provides that all of the defendant's acts or omissions in the same course of criminal conduct be considered, regardless of whether such conduct is charged. *Id.* § 1B1.3. Yet these policy levers have their limits. Judges may often be willing to accept plea agreements to move their docket along, and appeals from such cases are rarely taken. Although the pre-sentence report contains an independent investigation of the facts surrounding an offense, ultimately judges may be reluctant to second-guess the government's view of what charges it could readily prove at trial. Thus, to the extent those disparities are unwarranted, the Commission has taken reasonable measures within its power to reduce them.

CONCLUSION

For the foregoing reasons, an appellate court's according of a presumption of reasonableness to a Guidelines sentence is consistent with *Booker*. After *Booker* severed the standard of review in 18 U.S.C. § 3742(e), courts of appeals correctly accord such a presumption.

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[20] As the Commission has noted, mandatory minimum penalties exacerbate the effects of charge bargaining on sentence disparity because the charge itself dictates the penalty. *See Fifteen-Year Report* at 90-91. For example, 18 U.S.C. § 924(c), which punishes the use of a firearm in furtherance of a drug trafficking offense, carries a mandatory minimum five-year term, to run *consecutively to* the sentence for the underlying offense. Not surprisingly, § 924(c) counts raise the potential for disparity between prosecutors who frequently charge and bargain them away and those who do not. But that disparity, which results from the choices of Congress and prosecutors, cannot be considered *unwarranted* disparity within the meaning of § 3553(a)(6).

Respectfully submitted,

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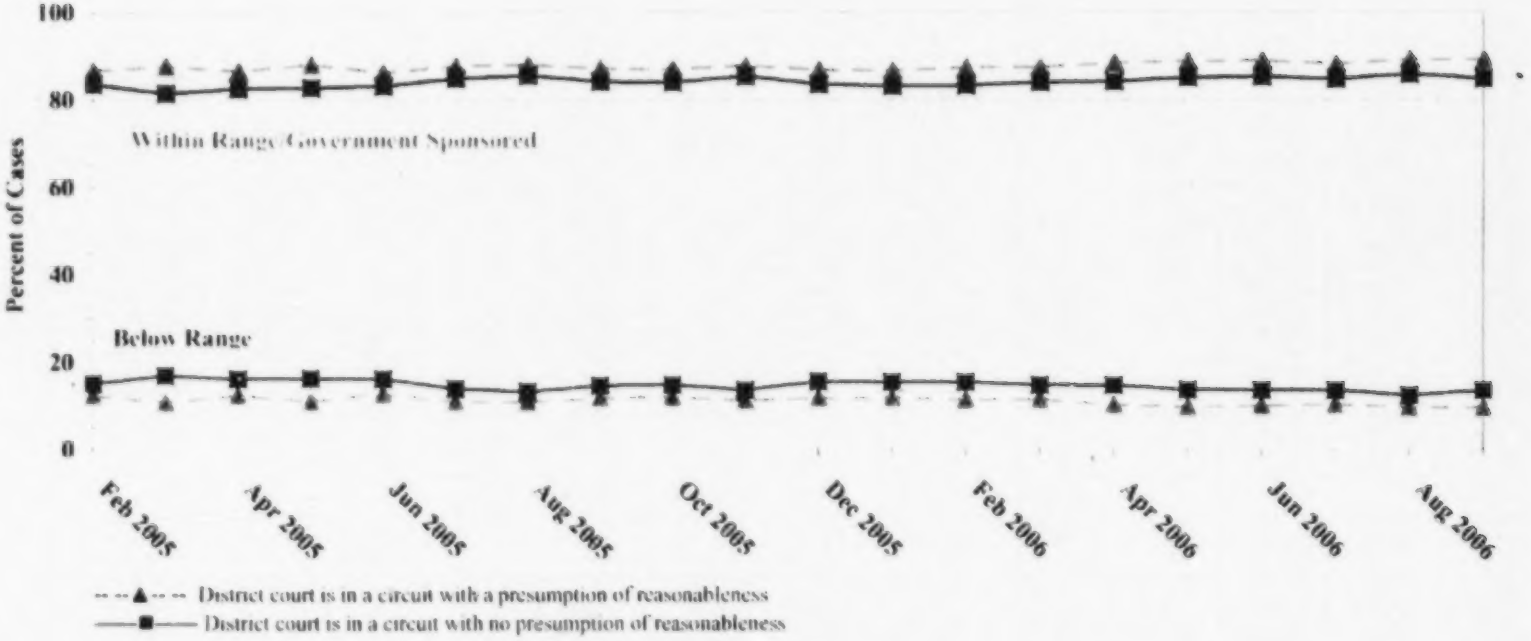
January 22, 2007

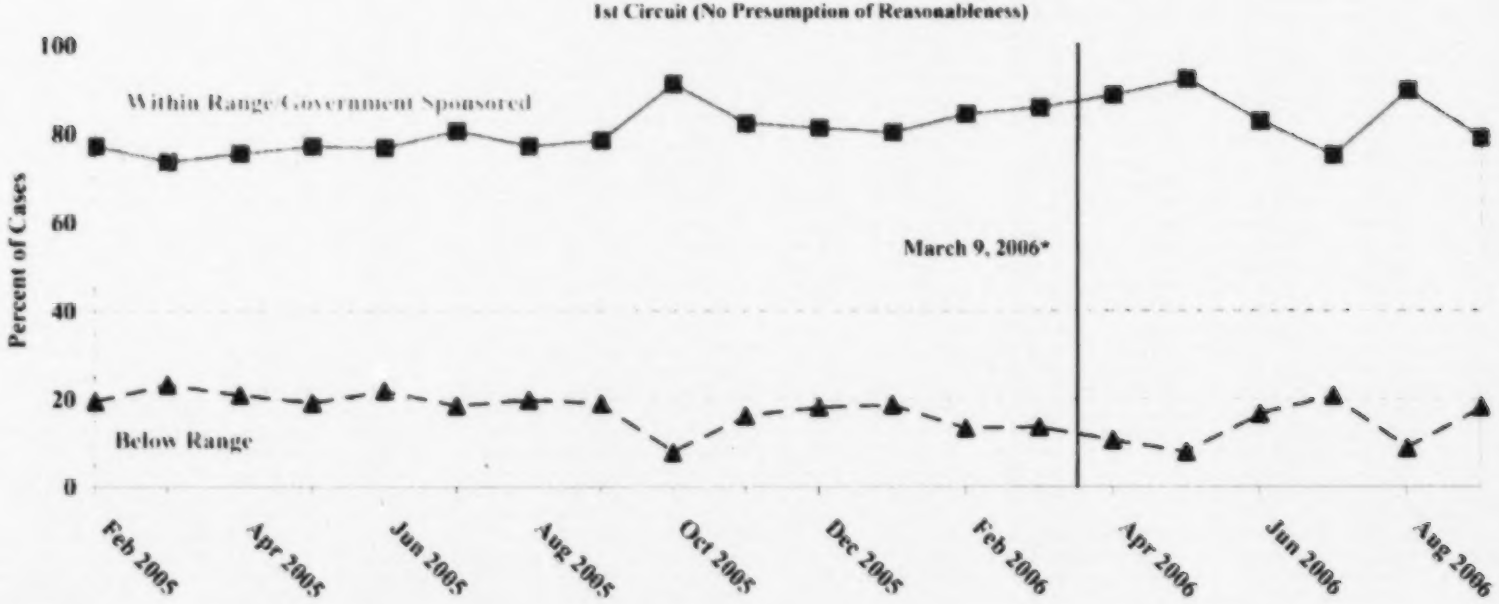
APPENDIX

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT AGGREGATED BY CIRCUIT DECISION
(February 1, 2005, through September 30, 2006)



SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

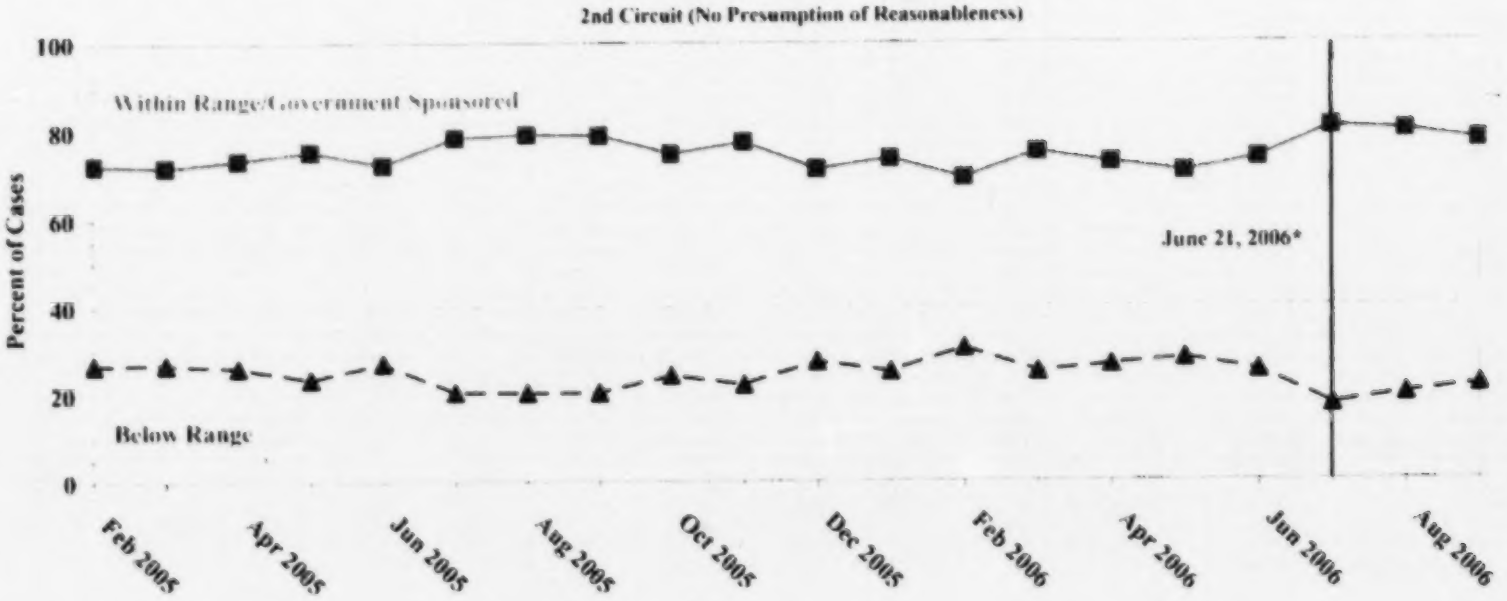
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT (February 1, 2005, through September 30, 2006)



**United States v. Jiménez-Beltre*, 440 F.3d 514 (1st Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

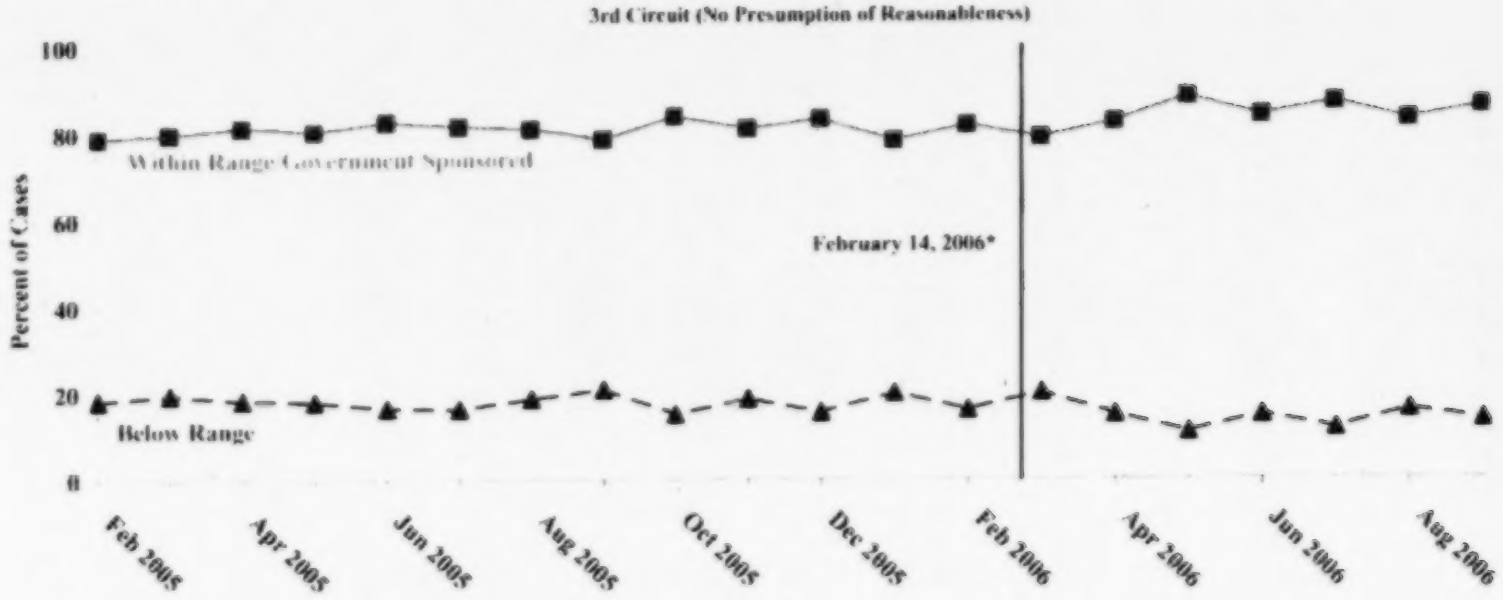
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

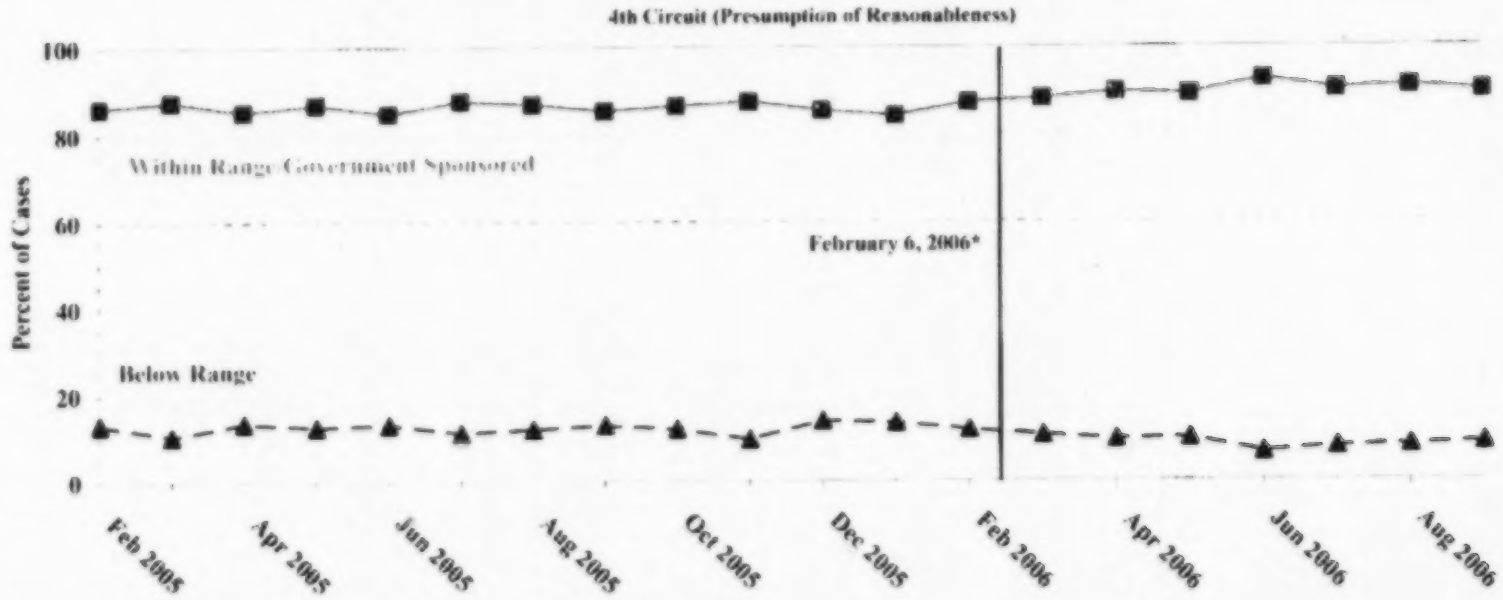
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Cooper*, 437 F.3d 324 (3rd Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

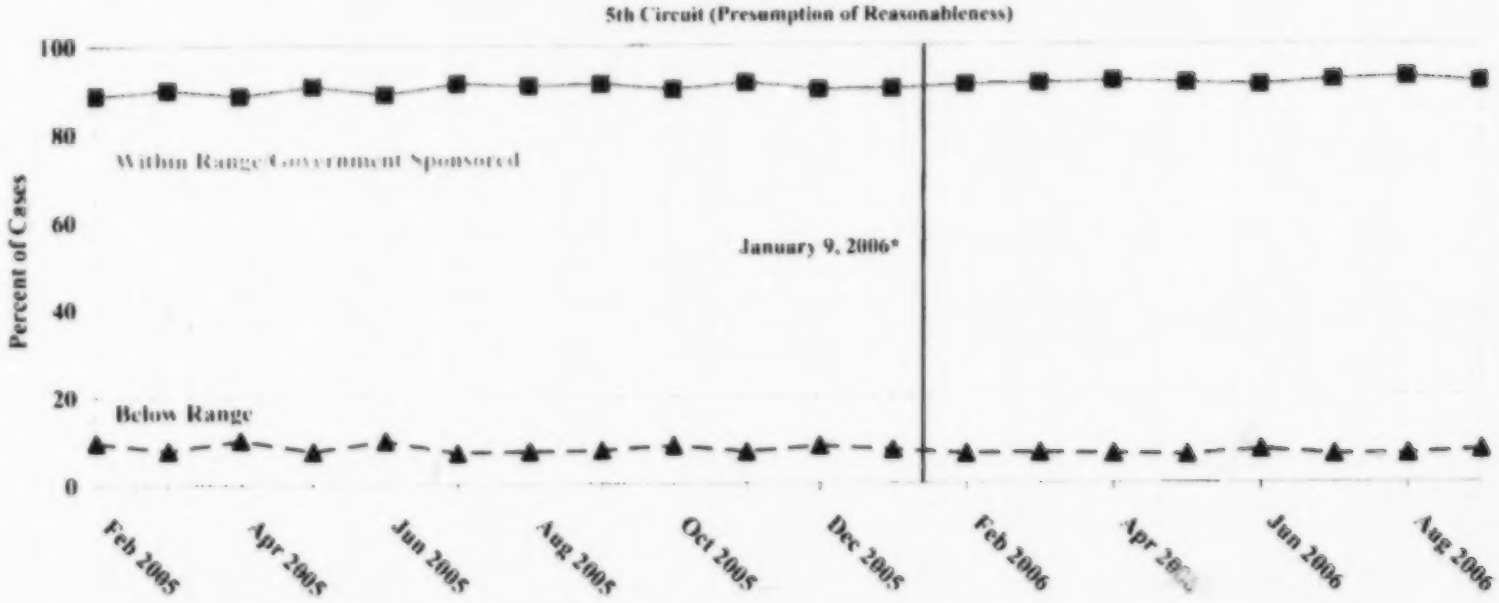
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Green*, 436 F.3d 449 (4th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

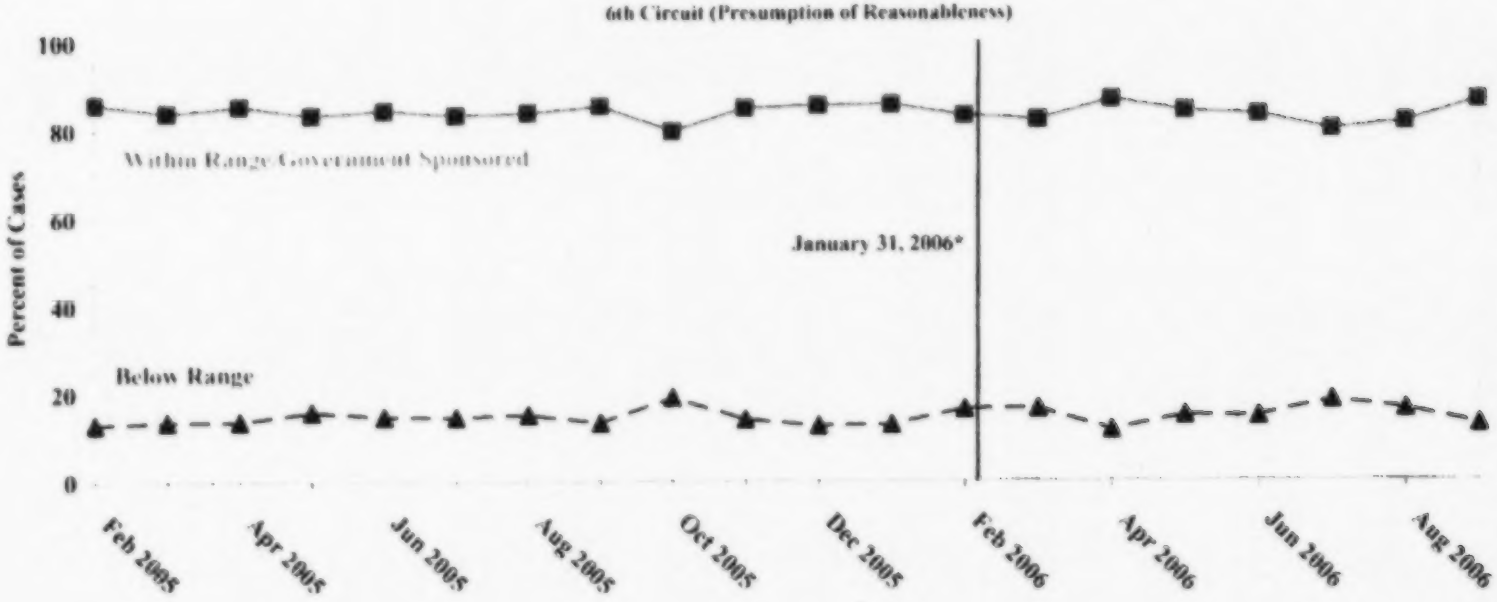
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Booker*, 435 F.3d 551 (5th Cir.2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

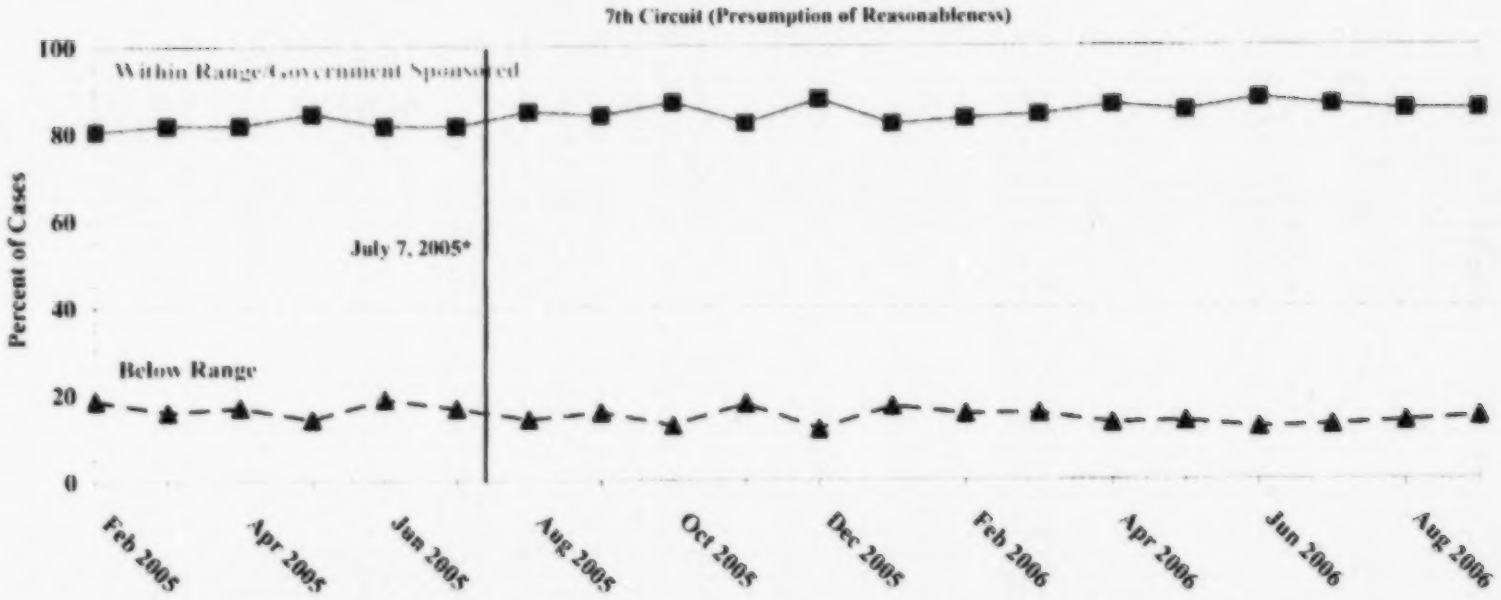
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Williams*, 436 F.3d 706 (6th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

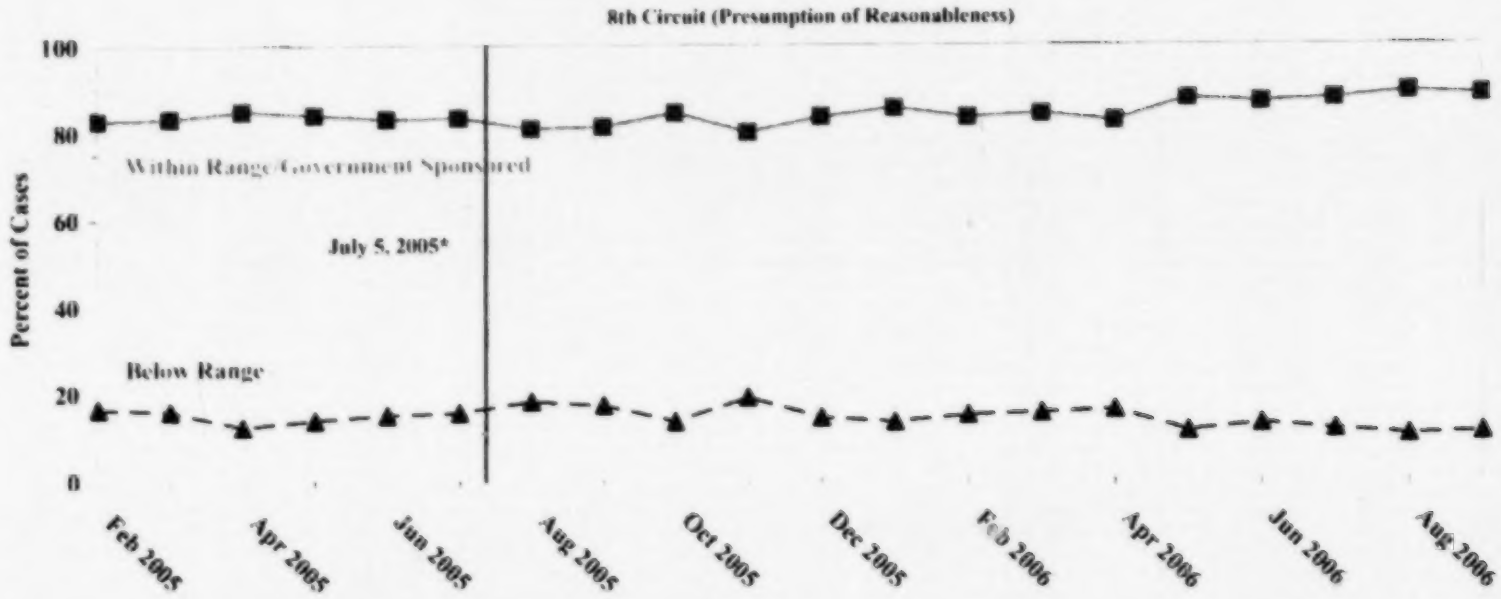
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

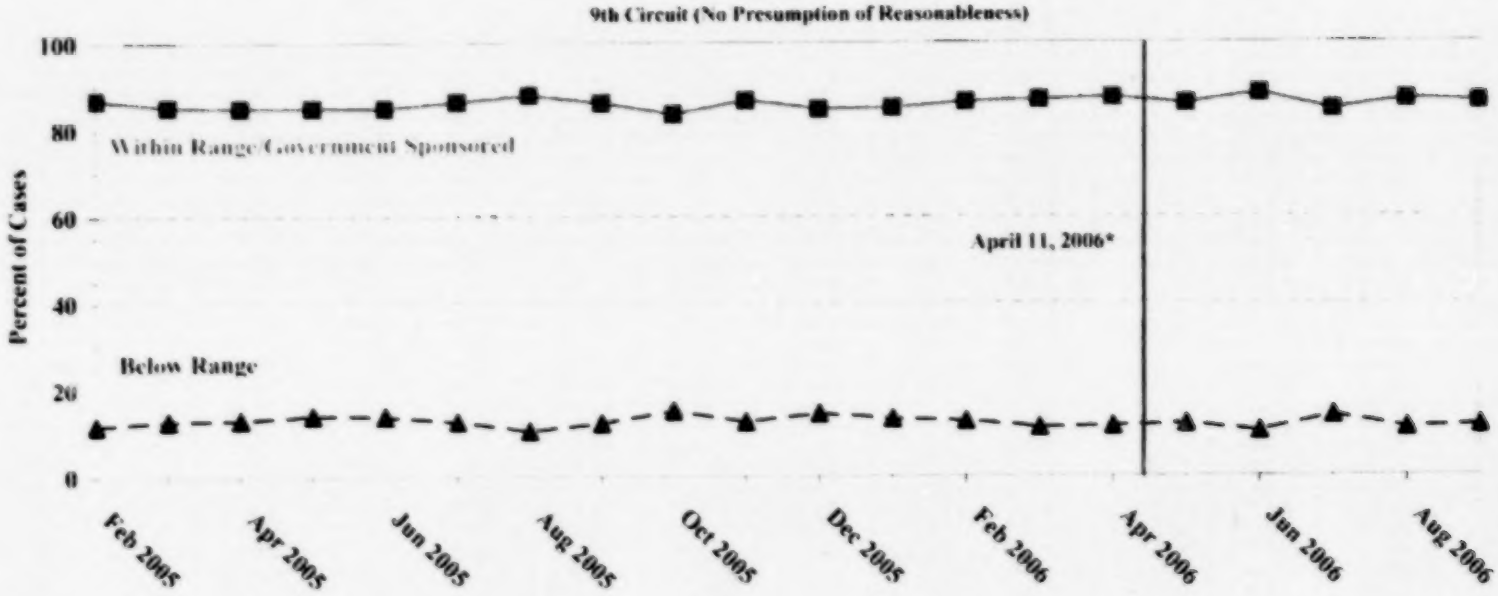
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

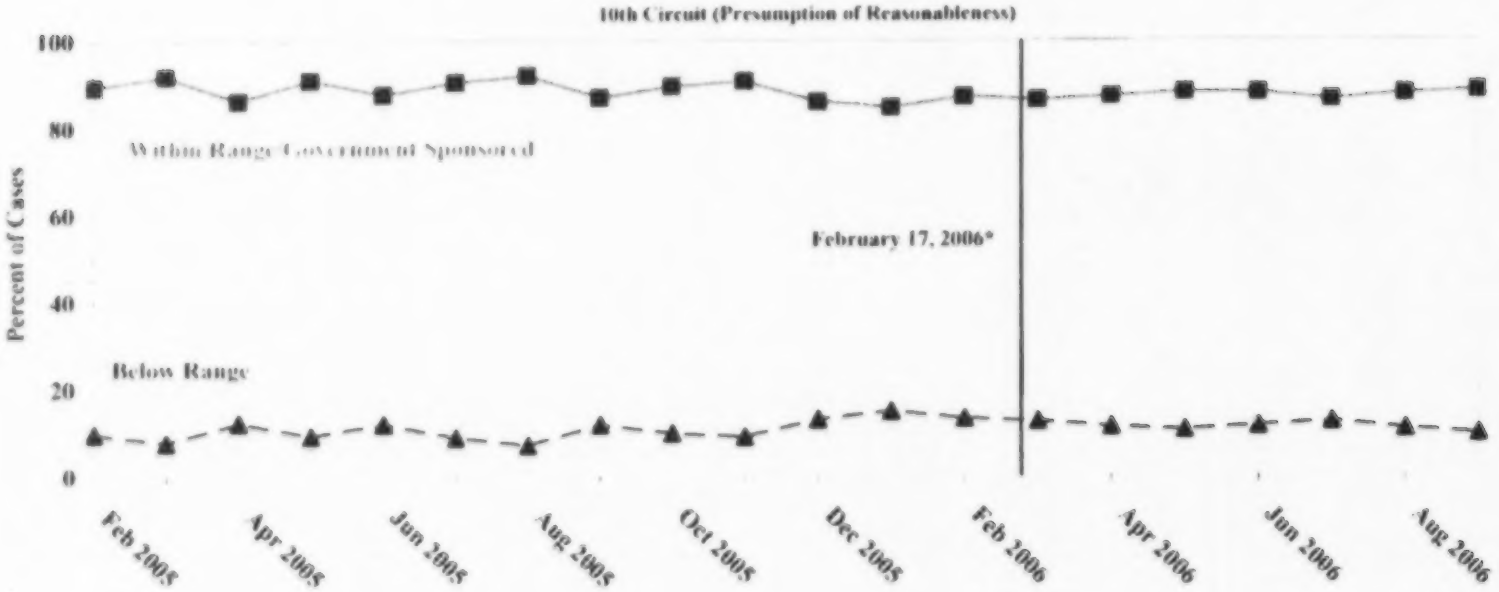
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

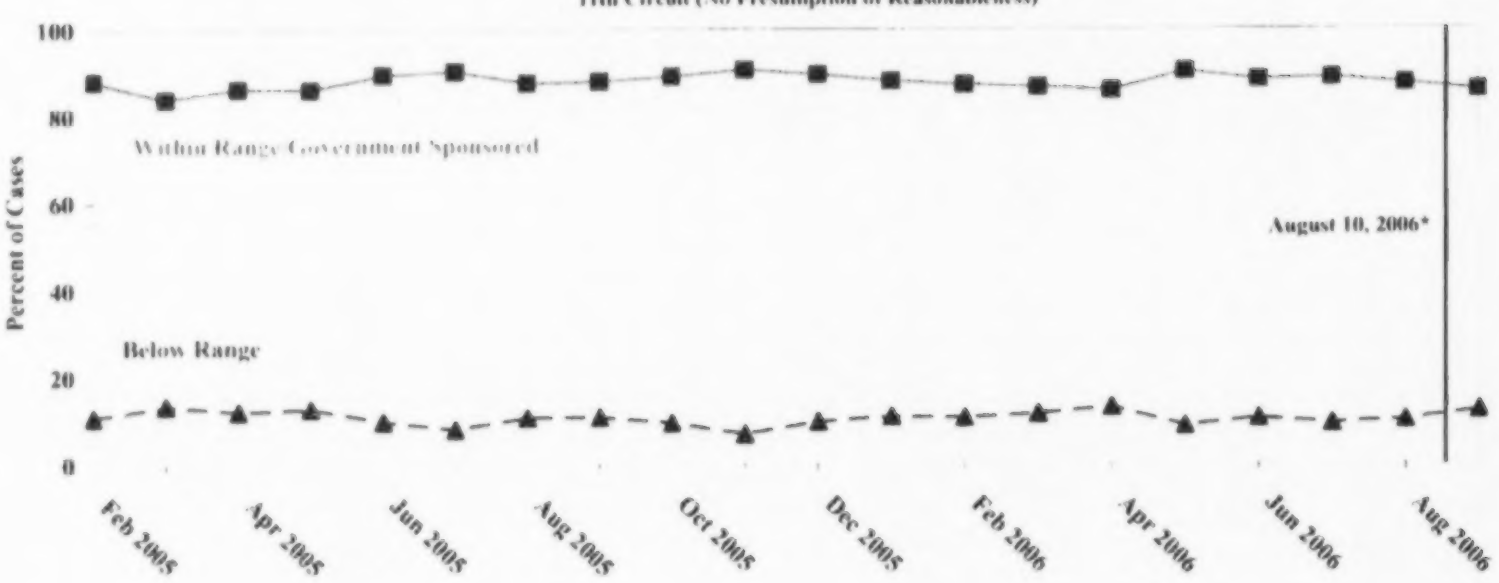
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

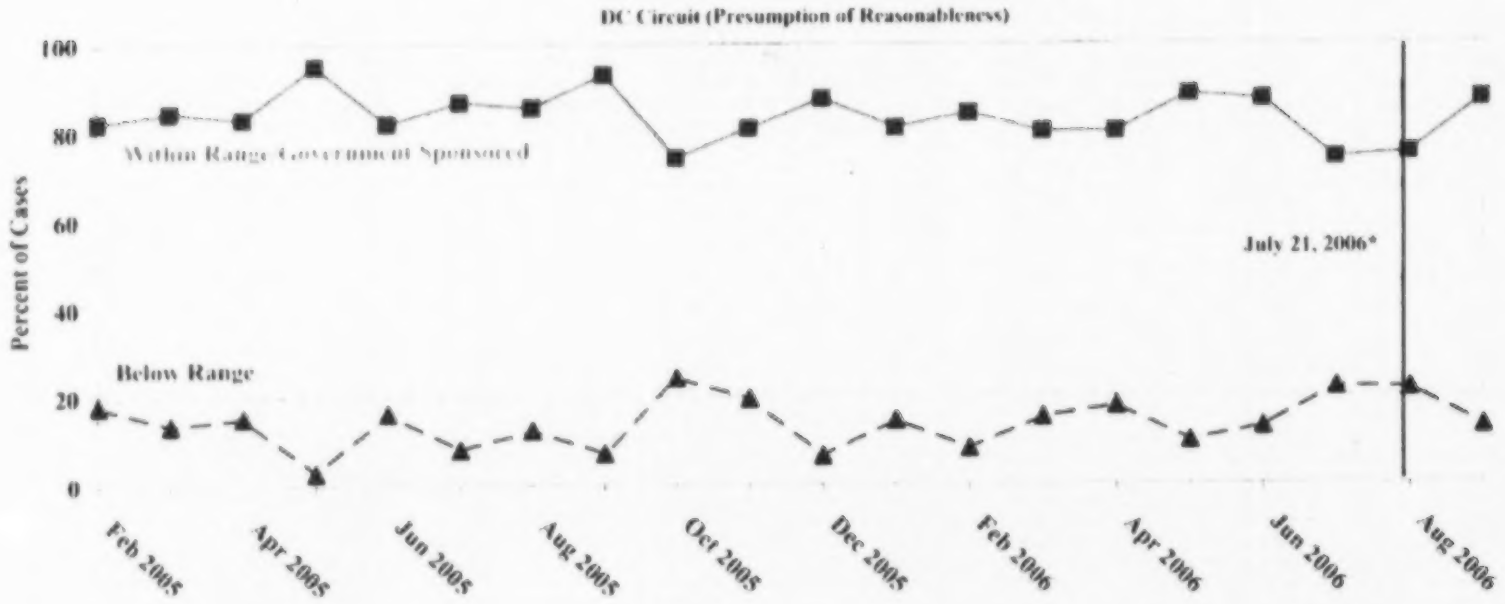
FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data.

FEDERAL WITHIN GUIDELINE RANGE/GOVERNMENT SPONSORED SENTENCES AND BELOW RANGE SENTENCES BY CIRCUIT
(February 1, 2005, through September 30, 2006)



**United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006)

SOURCE: U.S. Sentencing Commission, FY2005 data and preliminary FY06 data

Methodology for Appendix

The charts in this appendix are based on data from all federal cases where the sentence was imposed from February 1, 2005, through September 30, 2006, and which was received, coded, and edited by the United States Sentencing Commission by November 27, 2006. It excludes data from cases where the sentence was above the applicable sentence range provided by the United States Sentencing Commission's *Guidelines Manual* or where the relationship between the sentence and the Guidelines range could not be determined due to missing information. Cases are divided into two groups: (1) cases where the sentence imposed was either within the Guidelines range or below the range but sponsored by the government, and (2) cases where the sentence was below the Guidelines range.

During this period, 12 of the United States Courts of Appeals rendered decisions as to whether sentences within the Guidelines range were presumed reasonable. As used in the appendices, the term "presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are presumed reasonable. The term "no presumption of reasonableness" means that the sentence was imposed by a district court in a circuit where the court of appeals held that sentences within the Guidelines range are not presumed reasonable.

On chart 1, all sentences from a district court falling into the two categories discussed above are displayed by month. Data are grouped based on whether the court of appeals for the circuit to which a district court belongs decided that a sentence falling within the Guidelines range was presumptively reasonable. Cases are aggregated in this manner regardless of when the circuit court decision was issued during the period. For example, on July 21, 2006, the United States Court of Appeals for the District of Columbia held that the Guidelines were presumptively reasonable; therefore, all sentences from the

district court in that circuit that were below the Guidelines range are included in the group of cases represented on chart 1 on the line that is labeled "Below Range" and which contains the triangle symbol (which indicates a "presumption of reasonableness").

The remaining charts display the district court sentences by month over the period discussed above, sorted by the circuit to which the district court belongs. On these trend charts is a vertical line at the point where the court of appeals for that circuit issued its decision as to the presumptive reasonableness of sentences within the Guidelines range. Next to the line is the date of that decision.